IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON **PLAINTIFF**

V. **CIVIL ACTION NO.: 2:07CV42 P-B**

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY-FOX FILM CORPORATION
and JOHN DOES 1 AND 2 **DEFENDANTS**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE EXHIBITS A THROUGH E TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation ("Defendants") submit this Memorandum in Support of their Motion to Strike Exhibits A Through E to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss.

INTRODUCTION

In her Response to Defendants' Motion to Dismiss for Failure to State Claim and Memorandum in Opposition to Motion to Dismiss and Motion to Amend Complaint to Add Additional Ground [Docket Entry 10] ("Response in Opposition"), Plaintiff asserts that Defendants' exhibits to their Motion to Dismiss for Failure to State a Claim [Docket Entry 7] ("Motion to Dismiss") convert it to one for summary judgment, making proper her submission of matters outside of the pleadings. Specifically, Plaintiff relies upon the following exhibits in her Response in Opposition – each of which constitutes material outside the pleadings and is inappropriate for an opposition to a Rule 12(b)(6) motion to dismiss:

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- Plaintiff's Exhibit A: Pages 61-62 and 69-70 of *Clearance and Copyright: Everything the Independent Filmmaker Needs to Know*;
- Plaintiff's Exhibit B: Affidavit of Ellen Johnston;
- Plaintiff's Exhibit C: Affidavit of Craig Johnston;
- Plaintiff's Exhibit D: Excerpt - transcribed excerpt of interview of Sacha Baron Cohen by National Public Radio; and
- Plaintiff's Exhibit E: Affidavit of Carol Edwards.

Because Defendants' accompanying exhibits are fully appropriate for a Rule 12(b)(6) motion, Plaintiff's submission of evidence outside the pleadings should be stricken.

ARGUMENT

I. NOTHING IN DEFENDANTS' MOTION TO DISMISS WARRANTS ITS CONVERSION TO A MOTION FOR SUMMARY JUDGMENT; THUS, PLAINTIFF'S EXHIBITS A-E TO HER OPPOSITION SHOULD BE STRICKEN.

Contrary to Plaintiff's assertions, nothing in Defendants' Motion to Dismiss warrants conversion to a motion for summary judgment. Plaintiff bases her argument upon Defendants' submission of the following exhibits in their Motion to Dismiss:

- Defendants' Exhibit 2: DVD of the motion picture film, "BORAT - Cultural Learnings Of America For Make Benefit Glorious Nation Kazakhstan";
- Defendants' Exhibit 3: Transcript of the church camp episode, which includes the only crowd scene depicting Plaintiff;
- Defendants' Exhibit 4: Copies of the entry for "Pentecostals" from D. Barrett, *World Christian Encyclopedia* (Oxford University Press 1982) (including photograph of Pentecostals with hands raised in the air) and Chapter 21, "Pentecostal and Charismatic Worship" from G. Wainwright & K. Tucker, *The Oxford History of Christian Worship* (Oxford University Press 2006).

These exhibits are documents and things integral to Plaintiff's Complaint (but not attached thereto) and/or matters of which the Court can take judicial notice – neither of which necessitate conversion of Defendants' Motion to Dismiss to a motion for summary judgment.

Moreover, *Plaintiff's submission* of matters outside the pleadings in opposition to Defendants' Motion to Dismiss does not convert Defendants' motion into one for summary judgment. *Curry v. Shaw School Dist.*, No.: 4:06cv45-P-B, 2007 WL 670962 (N.D. Miss. February 28, 2007) (declining to consider excerpts from transcripts attached by plaintiffs to opposition to defendants' motion to dismiss, as such exhibits were not attached to their complaint and, thus, constituted matters outside the pleadings). Thus, Plaintiff is not entitled to submit and/or rely upon materials outside the pleadings in her Response in Opposition.

A. Documents or Things Referenced In or Relied Upon in Plaintiff's Complaint Are Considered Part of the Pleadings.

"Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). Plaintiff's entire suit relates to her very brief appearance in the award-winning movie entitled "BORAT - Cultural Learnings Of America for Make Benefit Glorious Nation Kazakhstan." *See* Complaint at ¶¶ 4-6 [Docket Entry 1]. Defendants' submission of a DVD of that film and the transcript of the crowd scene in which Plaintiff appears is appropriate in the context of their Motion to Dismiss because both items are central to Plaintiff's claims and, indeed, form the basis of her Complaint. *See Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1256 n.7 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989) (on motion to dismiss, considering entire publication so as to give context to allegedly defamatory statements); *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1014-15 (1st

Cir. 1988) (despite fact that plaintiffs did not attach the offending photograph and article to their complaint, defendants' submission of them did not convert motion to dismiss to motion for summary judgment; article was central to plaintiffs' claims and properly considered part of pleadings in libel/false light case); *Davis v. General Motors Acceptance Corp.*, 406 F. Supp. 2d 698, 701 n.1 (N.D. Miss. 2005) (consideration of retail installment contracts attached to the defendant's motion to dismiss did not convert it to one for summary judgment where the contracts were referenced in and were the basis of the plaintiff's complaint); *Cortec Indust., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (finding that in considering motion to dismiss, district court could have viewed certain documents that the plaintiff "had either in its possession or had knowledge of and upon which they relied in bringing suit" as they were "integral" to the plaintiff's complaint). The Court cannot be handcuffed in reviewing Defendants' Motion to Dismiss based upon Plaintiff's failure to provide a complete copy of the publication at issue. *See Fudge*, 840 F.2d at 1014-15; *Mitchell,* 703 F. Supp. at 1256 n.7. Accordingly, Exhibits 2 and 3 to Defendants' Motion to Dismiss are properly considered part of the pleadings and do not convert their motion into one for summary judgment.

B. Defendants' Submission of General Information Related to the Practice of the Pentecostal Religion Does Not Convert Their Motion to A Motion for Summary Judgment.

When deciding a motion to dismiss, the Court may consider "matters of which [it] may take judicial notice." *See* Memorandum In Support of Defendants' Motion to Dismiss at pp. 3, 9 (June 20, 2007); *Warden v. Barnett*, 252 F.3d 1356, 2001 WL 422613 at *1 n. (5th Cir. March 29, 2001). It is well-established that judicial notice may be taken of general religious matters. *See* FED. R. EVID. 201; *In re Rivera*, 214 B.R. 101, 107 (S.D.N.Y. 1997) (taking judicial notice of the fact that all major religions in the United States are supported by their congregants either monetarily or in some other fashion); *Northern Trust Co. v. Comm'r of Internal Revenue*, 116 F.2d 96, 98 (7th Cir. 1940) (taking judicial notice of the general teachings of the Christian Science religion); *Clay v. Rice*, No.: 01C50203, 2001 WL 1380526 at *3 (N.D. Ill., Nov. 5, 2001) (taking judicial notice of conditions surrounding Muslim religious practices); *see also Blount v. Sixteenth St. Baptist Church,* 90 So. 2d 602, 603 (Ala. 1921) ("The courts take judicial knowledge of general religious matters."); 31A C.J.S. *EVIDENCE* § 107 (1996) (general religious matters may be judicially noticed). For this reason, Defendants' submission of materials related to the practices of the Pentecostal religion – of which the Court may take judicial notice – does not convert their Motion to Dismiss to one for summary judgment.

Because Defendants' motion is appropriately considered as a Motion to Dismiss, Plaintiff cannot submit materials outside of the pleadings for the Court's consideration – nor can *her* submission of such materials convert Defendants' motion to one for summary judgment. *See Curry v. Shaw School Dist.*, No.: 4:06cv45-P-B, WL 670962 (N.D. Miss. February 28, 2007). Accordingly, Plaintiff's Exhibits A through E to her Response in Opposition and any reference to those exhibits therein should be stricken.

II. PLAINTIFF IS NOT ENTITLED TO RELY ON EXHIBIT D FOR THE FURTHER REASONS THAT IT CONSTITUTES INADMISSIBLE HEARSAY AND IS INCOMPLETE, UNRELIABLE AND MISLEADING.

Plaintiff's Exhibit D – a transcribed excerpt of an interview of Sacha Baron Cohen by National Public Radio – should be stricken for the additional reasons that it constitutes inadmissible hearsay and is incomplete, unreliable and misleading.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Pursuant to Fed. R. Evid. 802, hearsay is "inadmissible." The transcribed excerpt constitutes classic hearsay. As such, it is inadmissible and should be stricken. *See Borroto v. Campbell,* No.: 3:92cv2101-H, 2002 WL 655523 at *8 (N.D. Tex. April 18, 2002) (excluding as hearsay "Frontline" television news segment being offered to show that police used excessive force against minorities); *Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686, 692-93 (S.D. Ohio 2001) (excluding various hearsay exhibits, including a transcript from ABC News 20/20); *Worsham v. Provident Companies, Inc.,* 249 F. Supp. 2d 1325, 1336-37 (N.D. Ga. 2002) (excluding videotape and transcript of NBC's broadcast of *Dateline: Benefit of the Doubt* and a videotape and transcript of CBS's broadcast of *60 Minutes: Not the Best Policy?* where such items were offered to prove the truth of the matter asserted – *i.e.,* that defendants engaged in illegal practices); *United States v. Hatchett*, 918 F.2d 631, 641-42 (6th Cir. 1990) (finding videotaped segment from a "60 Minutes" television broadcast that focused on the collection techniques of a local IRS office to be "classic hearsay" where it was being offered to show that IRS agents used oppressive collections tactics).

Further, by definition, an "excerpt" of the interview is incomplete. Even if the interview were "complete", there is no means for determining whether the transcription by counsel's office staff is accurate or whether the broadcast of the interview was accurate and complete.[1] For these additional reasons, Plaintiff's Exhibit D should be stricken. *See* FED. R. EVID. 403.

III. LIKEWISE, PLAINTIFF IS NOT ENTITLED TO RELY ON EXHIBIT A FOR THE FURTHER REASONS THAT IT IS INCOMPLETE, UNRELIABLE AND MISLEADING.

Plaintiff's Exhibit A to her Response is an excerpt from a book entitled, *Clearance and Copyright: Everything the Independent Filmmaker Needs to Know*. Unlike the scholarly works offered by Defendants to illustrate facts of which the Court may properly take judicial notice[2], this work is nothing more than the author's interpretation of how independent filmmakers might avoid potential legal disputes - essentially a "do-it-yourself" or "self-help" guide to independent film-making. Although Plaintiff cites this work as authority for several propositions, it is not and does not purport to be an objective or scholarly work or legal treatise. Counsel for Defendants have found no reported decisions citing this publication for any purpose. Again, as an "excerpt", the material Plaintiff submits is incomplete. Because the excerpted material is incomplete, it is both unreliable and misleading. *See* FED. R. EVID. 403. For these additional reasons, Plaintiff's Exhibit A should be stricken.

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[1] While articles from newspapers and periodicals are self-authenticating, Fed. R. Evid. 902(6), television and radio broadcasts are not. Thus, there is no foundation for allowing this transcription as evidence of what Cohen was asked or what he purportedly said.

CONCLUSION

Plaintiff mistakenly treats Defendants' Motion to Dismiss as a summary judgment motion, and in doing so seeks to introduce materials that are outside the pleadings in support of her Response in Opposition. Nothing in Defendants' Motion to Dismiss justifies its conversion to a motion for summary judgment; accordingly, Plaintiff is not entitled to rely upon Exhibits A through E to her Response in Opposition to Defendants' Motion to Dismiss.

[2] *See Werk v. Parker*, 249 U.S. 130, 132-33 (1919) ("[W]e deem it clear, beyond question – that the court was justified in taking judicial notice of facts that appeared so abundantly from standard works accessible in every considerable library.")

For the forgoing reasons, Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation respectfully request that that the Court strike Exhibits A through E to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss and any reference to those exhibits therein, and for any other general or special relief as my be appropriate..

THIS, the 24th day of July, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
AND TWENTIETH CENTURY FOX FILM CORPORATION
s/ John C. Henegan
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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE EXHIBITS A THROUGH E TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 24th day of July, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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